IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-6345

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SUPREME COURT, U.S.

CRAWFORD BULLOCK, JR.,)
Petitioner)
vs.)
STATE OF MISSISSIPPI,)
Respondent)

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

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No.

PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE
OF MISSISSIPPI

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Mississippi entered in the above entitled case on August 6, 1980, with a petition for rehearing which was timely filed being denied on January 14, 1981.

QUESTIONS PRESENTED

The questions presented are (1) whether or not petitioner was denied effective assistance of counsel; (2) whether or not petitioner was denied due process of law; (3) whether or not petitioner was denied the equal protection of the laws; and (4) whether or not the death penalty constitutes cruel and unusual punishment.

CITATIONS TO OPINION BELOW

The opinion of the Supreme Court of Mississippi, printed in Appendix "A" hereto, infra, p. 11, is reported in 391 So. 2d 601.

JURISDICTION

The opinion and judgment of the Supreme Court of Mississ-

ippi was entered on August 6, 1980. Rehearing was denied on January 14, 1981. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257 (3).

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are:

A. Amendment V, which provides in pertinent part:

> "...nor be deprived of life, liberty, or property, without due process of law; ..."

B. Amendment VI, which provides in pertinent part:

> "...to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence."

C. Amendment VIII, which provides in pertinent part:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

D. Amendment XIV, Section 1, which provides in pertinent part:

> "...nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

HOW FEDERAL QUESTIONS RAISED AND ANSWERED BELOW

(1) The Sixth Amendment question of denial of effective assistance of counsel was not raised, nor would it be expected to be raised, nor answered.

(2) The due process questions were raised and answered as follows:

(1) Not raised.

(2) The question of the inflammatory pictures was raised at trial and in motion for a new trial, but was not couched in due process language, and the matter of error in

introduction was overuled by the Supreme Court of Mississippi.

(3) The question of the method used to exclude prospective jurors was raised at trial although not couched in due process terms, but was not raised and necessarily not answered on appeal.

(4) The question of Petitioner being denied due process because his motion for a recess was denied which forced Petitioner into the sentencing phase of the trial after 8:00 o'clock p.m., was ably raised at trial and in a motion for a new trial, but was perfunctorily dismissed on appeal.

(3) The equal protection argument was neither raised nor answered.

(4) The Eight Amendment question of the death penalty constituting cruel and unusual punishment was raised by pretrial and post trial motions, and at the trial, but was found on appeal to be without merit.

STATUTES INVOLVED

The statutes involved are Section 97-3-19 of the Mississippi Code of 1972 (Supp. 1980), whose text is set forth in Appendix "B"; Section 99-19-101 of the Mississippi Code of 1972 (Supp. 1980), whose text is set forth in Appendix "C"; and Section 99-19-105 of the Mississippi Code of 1972 (Supp. 1980), whose text is set forth in Appendix "D".

STATEMENT

The Petitioner, a twenty-one year old white male, was tried and convicted in the Circuit Court of the First Judicial District of Hinds County, Mississippi, for the capital murder of one Mark Dickson, while engaged in the commission of the

crime of robbery against Dixon. Petitioner, having been found indigent, was represented by appointed counsel at both the trial and appellate levels.

An excellent statement of the facts surrounding the crime itself is contained in the first eight (8) paragraphs of the opinion below, attached to this Petition as Appendix "A". Of particular significance is the Supreme Court of Mississippi's clear finding of fact that the argument which preceded the victims death was between the victim and Ricky Tucker, another defendant, who was tried subsequent to Petitioner and was convicted of capital murder and received a life imprisonment sentence, and the Supreme Court of Mississippi's clear finding of fact that Ricky Tucker "beat Dickson with his fists, knocked him to the ground, kicked him in the head as he lay on the ground and then repeatedly struck him with a concrete block on the head which resulted in his death." See Appendix "A" (p. 604 of 391 So. 2d).

REASONS FOR GRANTING THE WRIT

I.

Petitioner was denied effective assistance of counsel.

(a) Petitioner, who did not actually commit the murder of Mark Dickson, which fact was admitted by the Supreme Court of Mississippi, was given the death sentence. Petitioner was severed from the co-defendant, Ricky Tucker, and was tried before Tucker. Tucker, who inflicted the fatal blow on Dickson, was later tried and given a sentence of life imprisonment. The Petitioner was denied effective assistance of counsel in that his counsel did not seek prior to Petitioner's appeal to the

Supreme Court of Mississippi, through proceedings available to trial counsel, another hearing before the trial court to get into the record the fact that the co-defendant had been tried, convicted and given a life sentence together with the mitigating and aggravating circumstances present in the co-defendant's case vis-a'-vis those in Petitioner's case. If this had been done, the Supreme Court of Mississippi would have been likely, pursuant to Section 99-19-105(5) (b) to set aside the death sentence and remand the case for modification of the sentence to imprisonment for life, in view of the provision existing under Section 99-19-105(3) (c), viz., that in reviewing the death penalty imposed, the Mississippi Supreme Court will consider:

> "Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

Indeed, the Supreme Court of Mississippi subtly acknowledged the lack of evidence presented on this very question:

> In the case at bar, there is no record of the aggravating circumstances and mitigating circumstances in the trial of Tucker, and it is not possible to determine what circumstances influenced the jury in its life verdict.
> 391 So. 2d at p. 614.

After Tucker's life sentence was imposed, Petitioner's counsel's inactions did not qualify as "rendering reasonably effective assistance." see Beasley v. U.S. 491 F. 2d 687 (6th Circuit, 1974), and cases collated therein.

(b) Petitioner's appointed counsel did not move to have Petitioner psychiatrically examined and wholly failed to proffer an insanity defense, but yet introduced in the guilt phase of

of the trial the fact that Petitioner was admitted to the University of Mississippi Medical Center on May 15, 1978, and that Petitioner was diagnosed as suffering from psychosis. see Part XXV of lower court's opinion, 391 So. 2d at p. 610. This was only three (3) months before the crime in question, which was committed on September 22, 1978.

(c) Petitioner was denied effective assistance of counsel in that the record does not reflect any effort on the part of appointed counsel to show in any pretrial hearing or in Petitioner's Motion for New Trial that the manner in which the District Attorney selects, or chooses, whom he shall seek a death sentence, is selective, inconsistent, capricious, arbitrary and not sought in an even-handed manner under like or similar circumstances.

(d) Petitioner was denied effective assistance of counsel in that counsel did not argue before the Supreme Court of Mississippi the vitality of and possible unconstitutionality of the rule announced in Witherspoon v. State of Illinois, 391 U. S. 510, 88 S. Ct. 1770, 20 L. Ed 2d 776, which pertains to exclusion of prospective jurors because of their feelings or beliefs concerning imposition of the death penalty although counsel made a record on this point at the trial level.

II.

Petitioner was denied due process of law.

(a) The record, when viewed in its entirety, shows clearly that the imposition of the death sentence denied Petitioner due process of law.

(b) The arguments in reason I, when viewed with the en-

tire record, amount not only to a Sixth Amendment violation, but also necessarily a denial of due process.

(c) Allowing the jury to view the picture of the deceased, who had been beaten to death in the face with a concrete block by Ricky Tucker, the co-defendant, and not by Petitioner, contributed to the jury rendering a death verdict based on bias and passion, and thus denied Petitioner of a fundamentally fair trial comporting with due process.

(d) The rule announced in Witherspoon v. State of Illinois, 391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed 776, should be overruled since it denies Petitioner and other similarly situated of the right to a trial by a jury of his peers and consequently, denies Petitioner and others similarly situated due process of law.

(e) The fact that the trial court overruled Petitioner's motion for a recess until the following morning, after the guilt phase had concluded at 8:00 o'clock p. m., contributed, among other things, to a denial of Petitioner's right to a fair trial, and thus denied Petitioner due process of law.

III.

Petitioner was denied the Equal Protection of the laws.

The Mississippi scheme is such that a District Attorney is the one person who makes the decision as to whom he wants to prosecute under the capital murder statute, and it is he who solely who selects which defendant shall run the gauntlet and the statute, as construed and enforced in Mississippi, is not mandatory but is selectively applied, and as such, is arbitrary, capricious and inconsistent which denies Petitioner and others similarly situated not only Due Process of Law but the Equal

Protection of the Laws.

IV.

The Mississippi statutes constitute cruel and unusual punishment in that, as interpreted by the Supreme Court of Mississippi, an accomplice, although not actually killing any person, and with no intent to kill, may receive the death penalty. Thus, the statutes as applied are in conflict with this Court's opinion in Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed 2d 973 (1978), wherein this Court held that the Eighth and Fourteenth Amendments forbid imposition of a sentence of death where there is no finding that the defendant acted with the "conscious purpose of producing death." 438 U.S. at p. 628. As stated by Justice White:

> ...the infliction of death upon those who had no intent to bring about the death of the victim is not only grossly out of proportion to the severity of the crime but also fails to contribute significantly to acceptable, or indeed, any perceptible goals of punishment.
>
> 438 U.S. at p. 626.

V.

The decision of the lower court is clearly erroneous. The penalty was not imposed and upheld consistent with Sections 99-19-101 and 99-19-105 of the Mississippi Code of 1972 (Annotated). A review of the record clearly shows the imposition of the death penalty to have been wanton and freakish and not inflicted in a consistent and even-handed manner under like or similar circumstances.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX "A"

Crawford BULLOCK, Jr.

v.

STATE of Mississippi.

No. 51937.

Supreme Court of Mississippi.

Aug. 6, 1980.

Rehearing Denied Jan. 14, 1981.

Defendant was convicted in the Circuit Court, Hinds County, William D. Coleman, J., of capital murder and was sentenced to death. Defendant appealed, and Supreme Court, Lee, J., held that: (1) the trial court's finding that defendant's oral and written statements were freely and voluntarily given was supported by the evidence; (2) the indictment gave defendant fair notice of the crime charged; (3) defendant was not entitled to circumstantial evidence instructions; (4) the trial court did not err in refusing to reduce the charge to manslaughter; (5) the trial court did not err in declining to authorize expenses for employing a pathologist and criminal investigator to aid in the defense of the case; (6) photographs of the victim's body were properly admitted; (7) the pathologist's testimony was relevant; (8) various requested instructions were properly refused; (9) remarks of the district attorney in closing argument did not warrant a mistrial; (10) the evidence was sufficient to prove defendant guilty beyond a reasonable doubt; and (11) the death penalty was not so disproportionate or wanton as to require reduction to life imprisonment.

Affirmed.

1. Criminal Law ⇐414

Evidence at pretrial suppression hearing, including testimony of officers who were present when defendant made inculpatory statements, supported trial court's finding that the statements were freely and voluntarily made and that defendant knew what he was doing when he made oral statement and thereafter signed a written statement.

2. Indictment and Information ⇐71.4(5)

Indictment for capital murder while committing the crime of robbery, which allegedly did not set forth the essential elements of the crime of robbery and did not refer to the proper statute to charge the crime of capital murder, was sufficient to give defendant fair notice of the crime charged in clear and intelligible language and, therefore, the trial court correctly overruled defendant's demurrer. Code 1972, § 97-3-19(2)(e).

3. Criminal Law ⇐784(1)

Circumstantial evidence instructions should be given only in a purely circumstantial evidence case.

4. Criminal Law ⇐814(17)

Where there was direct evidence consisting of statements made by defendant and of his own testimony adduced at trial on guilt phase of case, defendant was not entitled to circumstantial evidence instructions.

5. Criminal Law ⇐784(1)

Instruction known as "two-theory instruction" should not be given except in purely circumstantial evidence cases.

6. Criminal Law ⇐753.2(8)

In passing on a requested peremptory instruction or motion for directed verdict, in a criminal case, all evidence most favorable to the state together with reasonable inferences therefrom is considered true and evidence favorable to defendant is disregarded.

7. Criminal Law ⇐753.2(5)

If evidence favorable to the state and reasonable inferences therefrom will support a guilty verdict, the request for a peremptory instruction must be denied as well as any motion for directed verdict.

8. Homicide ⇐268

In view of overwhelming evidence that defendant was present and aided and assisted in assaulting and killing victim and in removing and discarding victim's wallet and

personal effects and in taking victim's automobile, trial court properly refused to grant a peremptory instruction of not guilty.

9. Indictment and Information ⇐159(2)

Trial court committed no error when it declined to reduce charge of capital murder while committing crime of robbery to manslaughter. Code 1972, § 97-3-19(2)(e).

10. Criminal Law ⇐665(4)

Even if certain prosecution witnesses violated the sequestration rule by discussing their testimony with other witnesses prior to trial, the court had discretion to admit the witnesses' testimony where there was no prejudice from doing so.

11. Costs ⇐302.3, 302.4

In prosecution for murder while committing a robbery, the trial court did not commit error when it refused to grant defendant's motion for appointment of a criminologist or criminal investigator and a psychiatrist to assist in preparation of the defense.

12. Criminal Law ⇐438(6)

In prosecution for capital murder while committing a robbery, trial court did not abuse discretion when it admitted in evidence black and white photographs of the victim's body which depicted how the body had been weighted with concrete blocks and how a garden hose had been wound around the body to hold the blocks so that the body would submerge and which also corroborated pathologist's testimony concerning the wounds on the body.

13. Homicide ⇐175

In prosecution for capital murder while committing robbery, trial court properly admitted pathologist's testimony that the exact cause of the victim's death was a fracture of the skull and not drowning.

14. Homicide ⇐169(8)

In prosecution for capital murder while committing a robbery, no error arose from fact that trial court allowed three witnesses to testify about conversations they had with the victim the night he was killed.

15. Criminal Law ⇐867

Fact that witness made unresponsive reference to defendant's bad character did not require a mistrial where the trial court sustained a defense objection to the question and answer, instructed the jury to disregard the answer and determined by inquiry to the jury that they could disregard the answer.

16. Larceny ⇐32(1)
Robbery ⇐17(5)

An indictment charging robbery or larceny of property is properly laid in the party having possession, whether as owner, bailee or agent.

17. Homicide ⇐169(2)

Where it was undisputed that murder victim was in possession of a certain automobile on night of homicide, it was not error for trial court to permit a witness to testify about the ownership of the automobile the victim was driving.

18. Criminal Law ⇐438(2)

In prosecution for capital murder while committing a robbery, trial court did not abuse discretion when it admitted a high school photograph of the victim over an objection that the photograph was irrelevant and inflammatory.

19. Homicide ⇐289

Capital murder instruction which correctly set forth the issues that had to be decided by the jury before the accused could be convicted was properly given, in prosecution for capital murder while committing a robbery.

20. Criminal Law ⇐829(19)

In prosecution for capital murder while committing a robbery, it was not error for the trial court to refuse to give the "single juror" instruction where the principle of the instruction was covered in another instruction.

21. Criminal Law ⇐755½

An instruction which amounted to an improper comment on the weight and worth of the defendant's testimony was properly refused.

22. Criminal Law ⇐810

Where the instruction was in direct conflict with an instruction which told the jury to weigh the mitigating circumstance against any aggravating circumstances before returning a verdict, instruction which would have told the jury that it need not find any mitigating circumstances in order to return a sentence of life imprisonment was properly refused, in capital murder prosecution.

23. Homicide ⇐311

In prosecution for capital murder while committing a robbery, no error occurred when the trial court refused to instruct the jury that the decision to afford an individual defendant mercy does not violate the Constitution.

24. Homicide ⇐311

Requested instruction to the effect that the jury was to presume that the defendant would spend the rest of his life in prison if sentenced to life imprisonment and that the jury was to presume that the defendant would receive lethal gas until he was dead if sentenced to death was calculated to confuse the jury and was improper.

25. Criminal Law ⇐720(7)

Where defendant himself introduced in evidence a hospital record which indicated that he had been admitted to a certain medical center for treatment and that diagnosis indicated that he suffered from psychosis, it was fair comment for district attorney to state in closing argument that defendant's problem with psychosis was a possible explanation for his having committed homicide.

26. Criminal Law ⇐720(8)

In prosecution for capital murder committed during a robbery, it was not improper or prejudicial for the district attorney to state during closing argument to the jury "Now, look, if you see a guy on the street, do you walk up and whop him on the head and drop boulders on him and hit him with a two by four and then you take his billfold and you take his car, but you didn't rob him. Do you believe that?", the statement did not mislead the jury as to the elements of the crime of robbery.

27. Criminal Law ⇐713

There is wide latitude for attorneys to argue cases to jury.

28. Criminal Law ⇐720(1)

In view of testimony that it was impossible to remove a latent fingerprint from concrete and certain other materials introduced in evidence, it was not improper for the district attorney to indicate in closing argument that fingerprints could not be taken from all the evidence.

29. Criminal Law ⇐720(6)

Where the statement was incriminating and connected defendant with the crime and where, during the trial of the case, defendant's own counsel referred to the statement as a "confession," it was not objectionable for the district attorney to refer to the statement which defendant made to investigating officers as a "confession."

30. Criminal Law ⇐649(1)

Where defendant was not restricted in any manner in the presentation of his defense and was not prejudiced by the trial court's procedure, it was not error for trial court to deny defendant's motion for a recess until the following morning before proceeding to the sentencing phase of capital murder trial.

31. Homicide ⇐250

State's evidence, including oral and written confessions of defendant and his testimony at trial, was amply sufficient to prove beyond a reasonable doubt that defendant was guilty of capital murder. Code 1972, § 97-3-19(2)(e).

32. Criminal Law ⇐1213

The death penalty statute is not unconstitutional. Code 1972, §§ 99-19-101 et seq., 99-19-105.

33. Criminal Law ⇐59(5)

Any person who is present, aiding and abetting another in commission of a crime, is equally guilty with the principal offender.

34. Criminal Law ⇐1206(2)
Homicide ⇐354

In view of evidence concerning circumstances of crime, imposition of death penalty was not so disproportionate, wanton or freakish as to require that the sentence be reduced to life imprisonment. Code 1972, §§ 99-19-101 et seq. 99-19-105.

Bell & Brantley, Don H. Evans, Robert J. Brantley, Jr., Jackson, for appellant.

Bill Allain, Atty. Gen. by Marvin L. White, Jr., Sp. Asst. Atty. Gen., Edward Peters, Dist. Atty., Jackson, for appellee.

En Banc.

LEE, Justice, for the Court:

Crawford Bullock, Jr. was indicted at the November 1978 Term of the Circuit Court, First Judicial District, Hinds County, for the capital murder of Mark Dickson, while committing the crime of robbery against Dickson. A bifurcated trial was held during the May 1979 Term of said court, Honorable William F. Coleman presiding, and the jury returned a guilty verdict of capital murder at the conclusion of the first phase of the trial. A separate sentencing phase was held following the guilty verdict, and, after deliberation, the jury returned a verdict imposing the death sentence as punishment for the crime. Bullock has appealed here and has assigned and argued twenty-eight (28) errors in the trial below.

On the evening of September 21, 1978, Crawford Bullock, Jr. and Rickey Tucker went to Town Creek Saloon, where they drank alcoholic beverages during the night. When Bullock and Tucker decided to leave in the early morning of September 22, they discovered that the person with whom they had ridden there, had left them. Mark Dickson was leaving the place and he offered to give them a ride home in the gray Thunderbird automobile he was driving.

On the way home, Bullock had Dickson stop at a convenience store in order for him to buy some bread. Dickson gave Bullock thirty-five cents (35¢) for that purpose, but the money was returned when it was found the store had no bread.

Dickson drove on at his riders' instructions. Bullock asked him to stop the automobile in order that he could answer a call of nature. Upon returning to the vehicle, Bullock overheard an argument between Tucker and Dickson and heard Tucker say, "Don't make me pull this gun," and he heard Dickson say that he did not have any money but that they could have the automobile. All three re-entered the vehicle, the argument continued, and Dickson stopped on Byrd Drive near a construction site where blows were exchanged between Tucker and Dickson. Tucker told appellant to grab Dickson, which he did. Dickson broke away and left the vehicle. Tucker got out with a whiskey bottle, using it as a club, and advanced toward Dickson who fled with Tucker in pursuit. Tucker tackled Dickson; appellant caught up with them and grabbed Dickson by the head. Tucker struck Dickson on the head with the whiskey bottle which also hit Bullock's hand, broke and cut it. Tucker beat Dickson with his fists, knocked him to the ground, kicked him in the head as he lay on the ground and then repeatedly struck him with a concrete block on the head which resulted in his death. Appellant went across the street to an automobile agency and tried to start one of the vehicles on the outside of the building to no avail.

Tucker suggested that they burn the body and the car, but appellant told him that he knew of a lake near Byram where the body could be disposed of. Dickson's body was loaded into the car, and they drove to a car wash, where the blood was washed away. Tucker removed Dickson's wallet from the body, went through it, found no money and disposed of it in a garbage can. Appellant drove the vehicle to his home, where they cleaned up, obtained a garden hose and then drove to the lake near Byram. Dickson's outer clothing was removed, concrete blocks were placed in his T-shirt and shorts, the garden hose was wrapped around the body and the weights, and Tucker pulled the body out into the

lake and submerged it. Appellant also went into the lake, felt of the body with his feet, making sure that it was submerged and stuck in the mud at the bottom of the lake.

Appellant and Tucker returned to Jackson and to appellant's home, again cleaned up, and appellant took Tucker home, then went to the University Medical Center where he obtained medical attention for his hand. The next day Tucker and he drove in the Dickson automobile to McComb for the purpose of visiting appellant's grandfather. They failed to find him and returned to Jackson. Appellant retained possession of the automobile.

During the early morning hours of September 23, 1978, appellant began to have pain in his hand, and he returned to University Medical Center, driving the Dickson automobile, where he obtained prescriptions for his injury. On his way home from the hospital, he was stopped by officers of the Jackson Police Department, was arrested, and was taken to the police station. On being stopped and asked about the automobile he was driving, appellant responded that he had borrowed the automobile from a friend. While Dickson was driving the vehicle on the night of his death, the registration tag was on the back seat of the car and when Bullock was stopped, it had been placed on the tag mount outside the car.

At the police station, appellant made inculpatory oral and written statements about the commission of the homicide, which substantially set forth the facts related hereinabove.

GUILT PHASE

I.

[1] Did the court err in finding that appellant's oral and written statements were freely and voluntarily given?

Appellant moved to suppress all statements made by him while in custody of the officers, contending that the statements were inadmissible because they were not freely and voluntarily given. He was held in the Jackson City Jail for approximately nine (9) hours after his arrest and at the end of that period, he was questioned by Detective Fondren and Officer Jordan about the homicide. Appellant executed a written waiver of his constitutional rights, and afterwards, gave an oral statement to the officers setting out his involvement in the crime. The statement was reduced to writing and was signed by the appellant. A pre-trial suppression hearing was conducted, the officers present when the statements were made testified that appellant was advised of his constitutional rights prior to making the statement, that he acknowledged understanding them and executed a written waiver thereof. The oral statement made to the officers was typed up by Detective Fondren, was read by the appellant, and was then signed by him.

Appellant denied that the statements were freely and voluntarily made and contends that the officers withheld medical treatment for his injured hand until he gave the statements. The officers testified that appellant did not complain of pain with his hand until they had completed the interrogation. They offered medical assistance to him, but appellant insisted on getting through with the statement first, and that he then go to the doctor. The officers testified that appellant was alert and coherent, and that he was not under the influence of medication or pain. After the officers received the statements, appellant was taken to the hospital. His temperature was 103°, he was treated, and remained in the hospital for one week.

Detective Fondren visited appellant while he was in the hospital and, after again being advised of his constitutional rights, appellant told Detective Fondren that on the night of the homicide Tucker and he were high on drugs and beer and the only explanation he could give for killing Dickson was that Tucker was trying to rob him. Security Officer King was outside the hospital room and he could see Detective Fondren talking to appellant, but he could not hear what was being said. They both testified that his statement was given freely and voluntarily.

After appellant testified, the officers were placed on the stand in rebuttal, and testified that the *Miranda* rights were given, the statements were freely and voluntarily made, and that the appellant knew what he was doing when he made the statements and executed them. The procedure outlined in *Agee v. State*, 185 So.2d 671 (Miss.1966) was strictly followed, and the trial judge held that the statements made by appellant were freely and voluntarily given. The court's finding was supported by the evidence, and we cannot overrule or disturb that finding. *Clemons v. State*, 316 So.2d 252 (Miss.1975).

Appellant testified in his own defense at both phases of the trial. His testimony was practically identical with that of his statements, and reiterated and enlarged upon those statements.

II.

[2] Did the trial court err in refusing to sustain defendant's demurrer to the indictment?

Appellant contends that the indictment here was faulty and subject to demurrer for the reasons that it did not set forth the necessary and essential elements of the crime of robbery, and did not refer to the proper statute [Mississippi Code Annotated § 97-3-19(2)(c) (Supp. 1979)], to charge the crime of capital murder.

The same question was raised in *Bell v. State*, 360 So.2d 1206, 1208-09 (Miss.1978), wherein the Court held that the indictment, such as here, was sufficient to give the accused fair notice of the crime charged in clear and intelligible language. *See also Culberson v. State*, 379 So.2d 499 (Miss. 1979); *Bell v. State*, 353 So.2d 1141 (Miss. 1977). The trial court properly overruled the demurrer.

III.

Did the trial court err in refusing to grant appellant's requested circumstantial evidence instructions?

[3, 4] Appellant contends that the trial court should have granted the circumstantial evidence instructions requested by him. Such instructions should be given only in a purely circumstantial evidence case. *DePriest v. State*, 377 So.2d 615 (Miss.1979). The case *sub judice* does not come under that classification because there was direct evidence consisting of the statements made by appellant and his own testimony adduced in the trial on the guilt phase of the case. *See McCray v. State*, 320 So.2d 806 (Miss.1975).

[5] The trial court granted an instruction known as the "two-theory instruction" which should not be given, except in purely circumstantial evidence cases. Thus, even though appellant was not entitled to circumstantial evidence instructions, he received the benefit of the principle by the two-theory instruction granted by the court.

IV.

Did the trial court err in refusing to grant appellant's requested peremptory instruction and in refusing to reduce the charge to manslaughter?

[6, 7] In passing upon a requested peremptory instruction, or motion for directed verdict, in a criminal case, all evidence most favorable to the State, together with reasonable inferences, are considered as true and evidence favorable to the appellant is disregarded. If such evidence will support a guilty verdict, the request for peremptory instruction must be denied, as well as the motion for directed verdict. *Warn v. State*, 349 So.2d 1055 (Miss.1977); *Toliver v. State*, 337 So.2d 1274 (Miss.1976).

[8] In the case *sub judice*, appellant argues that there was no evidence of intent to rob Dickson and that appellant was an unwilling participant in the robbery-homicide. The evidence is overwhelming that appellant was present, aiding and assisting in the assault upon, and slaying of, Dickson and in removing and discarding his wallet and personal effects therein, and in the taking of the T-bird automobile, which was in the lawful possession and use of Dickson.

[9] The trial court did not err in refusing to grant the peremptory instruction of not guilty. Likewise, the court committed no error in declining to reduce the charge from capital murder to manslaughter. Even so, the question of manslaughter was submitted to the jury upon a proper instruction.

V.

[10] Did the trial court err in refusing to exclude the testimony of certain State's witnesses on the ground that the witnesses discussed their testimony with other witnesses prior to trial and violated the sequestration rule?

Appellant contends that Officer Jackson changed her testimony between the time of the suppression hearing and the date of trial, that at the pre-trial hearing, she testified appellant was handcuffed after his arrest, and, at the trial, she was not sure whether he had been handcuffed. Appellant claims that the change in Officer Jackson's testimony was the result of talking with other officers subsequent to the preliminary hearing.

An examination of the record does not support the argument of appellant on this matter, and indicates that any difference in Officer Jackson's testimony resulted from the manner in which questions were phrased to her. There is no indication of prejudice resulting to the appellant, and, if there was a violation of the sequestration rule, the court has discretion in admitting the witness's testimony, particularly where, as here, there was no prejudice. *Ford v. State*, 227 So.2d 454 (Miss.1969).

VI.

[11] Did the trial court err in refusing to grant appellant's motion for appointment of a criminologist or criminal investigator and a psychiatrist to assist in preparation of the defense?

Appellant says that he was denied a fair trial because the lower court overruled his motions to employ various experts. Appellant filed a motion for psychiatric and psychological examinations at the Jackson Mental Health Center. The motion was granted and an examination was conducted. Appellant then requested that another psychiatrist examine him; the court heard the motion and granted same. The record does not indicate whether the examination was conducted.

Appellant also filed a motion requesting that the court pay for the expenses of his own pathologist, which was substituted for a motion to employ a criminal investigator. The appellant did not outline any specific costs for such an investigator, and did not indicate to the court in any specific terms as to the purpose and value of such an individual to the defense. We are of the opinion that the lower court committed no error in declining to authorize expenses for employing such expert and investigator. *Davis v. State*, 374 So.2d 1293 (Miss.1979); *Laughter v. State*, 235 So.2d 468 (Miss. 1970).

VII

[12] Did the lower court err in admitting photographs of the deceased during trial?

The State offered in evidence, and the lower court admitted, black and white photographs of the victim after he had been slain. Appellant claims that the pictures were inflammatory and had no probative value. The photographs showed how the body was weighted with concrete blocks and how the garden hose was wound around it to hold the blocks in the body for the purpose of submerging it. The condition of the body, as reflected by the photographs, corroborated the testimony of the pathologist, particularly concerning the wounds upon the body.

The trial judge has wide discretion in admitting photographs into evidence, and we are of the opinion that he did not abuse his discretion in admitting the photographs of the victim. *Irving v. State*, 361 So.2d 1360 (Miss.1978); *Mallette v. State*, 349 So.2d 546 (Miss.1977).

VIII.

[13] Did the trial court err in admitting the testimony of Dr. Galvez and in referring to a photograph introduced by his testimony?

Appellant argues that the evidence of the pathologist, Dr. Galvez, was cumulative and was not necessary to prove the corpus delicti, since the crime had been established by previous witnesses. Appellant relies upon *Jackson v. State*, 337 So.2d 1242 (Miss. 1976) for the principle that the State's use of a pathologist's testimony is unnecessary to prove corpus delicti where the deceased was found in an unusual place under unusual circumstances. However, *Jackson* does not support his argument on this point. The pathologist's testimony was proper and beneficial to establish the exact cause of death, which resulted from a fracture of the victim's skull. It further reflected that absence of water in the lungs indicated death to be due to the head injury rather than drowning. The testimony and evidence were properly admitted.

IX.

[14] Did the trial court err in allowing certain witnesses to testify and in violating the bifurcated trial principle mandated by *Jackson v. State*?

Appellant contends that the court erred in allowing Larry Keen, W. L. Moss and James Jones to testify about conversations they had with Mark Dickson the night he was killed. Appellant says that such testimony, together with the photographs, should not be introduced during the guilt phase of the trial, and, if at all, only during the sentencing phase. The testimony of such witnesses was to the effect that Dickson stated he was not in the mood for drinking and that he was going home because he did not have any money on him. Appellant's attorney conducted a rigid cross-examination of those witnesses concerning what Dickson had told them. The direct examination and the cross-examination were not prejudicial to appellant, and there is no merit in the assignment. *Stringer v. State*, 279 So.2d 156 (Miss.1973); *Fielder v. State*, 235 Miss. 44, 108 So.2d 590 (1959).

X.—XI.

Did the trial court err in not permitting appellant to cross-examine witnesses as to Mark Dickson's character and did it err in refusing to grant a mistrial?

Did the trial court err in allowing Larry Keen and James Jones to testify to the good character and habits of Mark Dickson and in not declaring a mistrial when Larry Keen mentioned the bad character of appellant and in not allowing defense counsel to cross-examine those witnesses as to the bad character of Mark Dickson?

[15] Assignments of error IX, X and XI involve substantially the same question(s). The witnesses mentioned above testified to statements made by Dickson, which have been covered in Assignment IX and which do not constitute reversible error.

Appellant contends that the State attacked the character of appellant by the following question and answer:

Q. Did Mark Dickson, to your knowledge, know either Rickey Turner or Crawford Bullock?

A. I think he knew Bullock. He knew Bullock because Bullock was raised in our neighborhood and we had seen him before out. I was with Mark at the Zodiac Lounge and Crawford [Bullock] was engaged in a fight there and we saw him there, you know.

BY MR. EVANS:

Your Honor, I am going to object to this and move for a mistrial—ask that that be stricken from the record and move for a mistrial. This is absolutely irrelevant. The testimony is inadmissible, it's prejudicial and it's just not supposed to be in this case.

BY THE COURT:

Members of the jury, disregard the last statement that the witness made. Do all of you tell me that you can disregard the last statement?

(Jurors nodding affirmative)

The trial judge sustained appellant's objection to the question and answer, and instructed the jury to disregard the answer, and asked the jury if they could disregard it. The jury gave the judge an affirmative reply. The answer was not responsive to the State's question, the trial judge directed the jury to disregard the question and answer, and it does not constitute reversible error. *Holifield v. State*, 275 So.2d 851 (Miss.1973); *Hughes v. State*, 179 Miss. 61, 174 So. 557 (1937); *Dabbs v. Richardson*, 137 Miss. 789, 102 So. 769 (1925).

XII.

Did the trial court err in permitting witnesses to testify as to the ownership of the automobile driven by Mark Dickson on the night of the homicide?

[16, 17] Appellant contends that the court erred in permitting Larry Keen to testify about the ownership of the gray T-bird automobile Dickson was driving the night of the homicide. It is undisputed that Dickson was in possession of the said automobile. An indictment charging robbery or larceny of property is properly laid in the party having possession, either as owner, bailee or agent. *Mahfouz v. State*, 303 So.2d 461 (Miss.1974); *Minneweather v. State*, 55 So.2d 160 (Miss.1951). The assignment is without merit.

XIII.

[18] Did the trial court err in permitting introduction of the high school photograph of Mark Dickson?

Appellant objected to its introduction on the ground that it was irrelevant and inflammatory. The trial judge did not abuse his discretion in admitting the photograph. *Voyles v. State*, 362 So.2d 1236 (Miss.1978); *May v. State*, 199 So.2d 635 (Miss.1967).

XIV.

[19] Did the trial court err in granting Instruction # 15, which was the capital murder instruction?

Appellant cites no authority on this assignment, but simply argues that it was erroneously given for the reason that there was no requirement for the jury to find Mark Dickson was in fact killed. The pertinent part of the instruction follows:

"[A]nd, if the Jury further finds from the evidence in this case, beyond a reasonable doubt, that on said date aforesaid, while engaged in the commission of the aforesaid robbery, if any, that the said Crawford Bullock, Jr., did alone, or while acting in consert [sic] with another, while present at said time and place by consenting *to the killing of the said, Mark Dickson*, and that the said Crawford Bullock, Jr., did any overt act which was immediately connected with or leading to its commission, without authority of law, and not in necessary self defense, by any means, in any manner, whether done with or without any design *to effect the death of the said Mark Dickson*, " (Emphasis added)

It may be noticed that the instruction does require a finding that Mark Dickson was killed, and it correctly sets forth the issues which must be decided by the jury before the accused could be convicted. *Williams v. State*, 317 So.2d 425 (Miss.1975).

Assignments of Error XV through XXIV deal with the refusal of the trial court to grant certain instructions requested by the appellant. Was it error to refuse those instructions?

XV.

[20] Instruction D-8 was the single juror instruction. The appellant argues that the instruction was "a fair and accurate representation of the law" and should have been granted. The principle of the instruction was covered in Instruction # 12, and, although in different language, it was not error to refuse the instruction. *Reagan v. State*, 318 So.2d 879 (Miss.1975).

XVI.

[21] Instruction D-9 was condemned in *McNamee v. State*, 313 So.2d 392 (Miss. 1975) as being an improper comment on the weight and worth of the defendant's testimony and was properly refused.

-19-

XVII.

Instruction D-10 was correctly refused by the lower court since it should be given only in a purely circumstantial evidence case.

XVIII.

[22] Instruction D-30 would have told the jury that it need not find any mitigating circumstances in order to return a sentence of life imprisonment, that a life sentence may be returned regardless of the evidence. The instruction was in direct conflict with Instruction D-20 which told the jury to weigh the mitigating circumstances against any aggravating circumstances before returning a verdict and was correctly refused under *Jackson v. State*, *supra*.

XIX.

[23] Instruction D-31 would have told the jury it was instructed there is nothing that would suggest the decision to afford an individual defendant mercy violates the constitution. That statement was taken from language set forth in the opinion of *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 14 L.Ed.2d 859 (1976). It is simply a statement of the opinion, and was not intended as an abstract proposition of law to be given in jury instructions.

XX.

[24] Instruction D-33 would have instructed the jury it was to presume that, if the accused was sentenced to life imprisonment, he would spend the rest of his life in prison, and the jury was to presume that, if the accused was sentenced to death, he will receive lethal gas until he is dead. The instruction was improper and was calculated to confuse the jury.

XXI

Instruction D-34 and the sense of same, was contained in Instruction # 14, which was granted by the court, and it was not error to refuse D-34.

XXII.—XXIV.

Instructions D-35, D-36 and D-37 did not put the lower court in error for their refusal. They were either improper instructions, or the proper and correct parts were included in Instruction # 11 granted by the court.

XXV.

[25] Did the court err in failing to sustain appellant's motion for a mistrial made during the State's closing argument and in not sustaining objections to prejudicial and inflammatory arguments of the district attorney?

Appellant contends that, during closing argument, the district attorney referred to his problem with psychosis as being a possible explanation for committing the crime. He objected to the remark and stated that such remark was not supported by the evidence. However, appellant himself introduced in evidence the hospital record of appellant which indicated that on May 15, 1978, he was admitted to the University Medical Center for treatment and the diagnosis indicated that he suffered from psychosis. Such evidence was fair comment in the argument by the district attorney.

[26] Appellant next argues that the district attorney gave a false impression to the jury of the elements of the crime of robbery. Part of the argument follows:

> "Now, look, if you see a guy on the street, do you walk up and whop him on the head and drop boulders on him and hit him with a two by four and then you take his billfold and you take his car, but you didn't rob him. Do you believe that?"

[27] The trial judge overruled the objection and stated that it was final argument. There is wide latitude for attorneys to argue cases to juries, and we do not think that such remarks of the district attorney were improper or prejudicial.

[28] Appellant objects to argument of the district attorney, which he says was improper because it indicated that finger-

prints could not be taken from all the evidence. There was testimony that it was impossible to remove latent fingerprints from concrete and certain other materials introduced in evidence. This was fair argument, and did not constitute error.

[29] Appellant lastly objects to the district attorney's reference to the statement made by appellant to the investigating officers as being a confession.

The statement was incriminating, connected appellant with the crime, and may properly be referred to as a confession. Also, during the trial of the case, appellant's own counsel referred to the statement as being a confession. There is no merit in the contention.

XXVI.

[30] Did the lower court err in denying appellant's motion for a recess until the following morning before proceeding to the sentencing phase of the trial?

The jury returned a verdict of guilty of capital murder in the first phase of the trial at approximately 8:00 p. m. The jurors had eaten supper at that time. The trial judge indicated his desire to proceed with the sentencing phase of the case, whereupon, appellant moved the court to recess until the following morning for that purpose. The trial judge asked the jury whether any of them were too tired to proceed, they indicated that they were not, and the judge assured the jury that, if they became tired at any time, he would stop the proceeding and retire for the evening. The trial proceeded in the sentencing phase and the jury returned a verdict for the death penalty at approximately 11:00 p. m. The facts of the case *sub judice* may be distinguished from that of *Thornton v. State*, 369 So.2d 505 (Miss.1979) where two of the defendant's attorneys, one approximately seventy (70) years old and one in ill health, were not able to properly function because of their infirmities. The attorneys were also restricted in their final argument to short periods of time.

Here, appellant was not restricted in any manner in the presentation of his defense, the record reflects that he was not prejudiced by proceeding into the sentencing phase and that he had a fair trial. The lower court proceeded under the guidelines of *Jackson v. State*, and there was no error in so doing.

XXVII.

[31] Was the verdict of the jury contrary to the overwhelming weight of the evidence and did it evince bias, passion and prejudice?

The sense and principle of this assignment of error has been discussed in Assignment IV, wherein the appellant claimed that the court erred in declining his request for a peremptory instruction of not guilty.

As stated there, the evidence for the State, including the oral and written confessions of appellant, his testimony at the trial, and the physical evidence, unless rejected by the jury, was amply sufficient to prove beyond reasonable doubt the guilt of the appellant and the verdict was not contrary to the great weight of the evidence.

XXVIII.

[32] Did the lower court err in overruling appellant's motion to quash the indictment and in declining to declare the statute unconstitutional?

This Court has spoken on the constitutionality of the death penalty statute and has determined that the statute, as implemented by the legislature and construed by the court, is constitutional. In *Coleman v. State*, 378 So.2d 640 (Miss.1979), the Court said:

> "This contention is without merit. The constitutionality of the death penalty as imposed under Section 99-19-101, et seq. has been firmly established. *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); *Washington v. State*, 361 So.2d 61 (Miss.1978)." 378 So.2d at 647.

In our opinion, there were no reversible errors in the guilt phase of the trial and the case should be, and is, affirmed.

SENTENCING PHASE

Mississippi Code Annotated Section 99-19-105 (Supp. 1979) provides the following:

"(1) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Mississippi Supreme Court. The clerk of the trial court, within ten (10) days after receiving the transcript, shall transmit the entire record and transcript to the Mississippi Supreme Court together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Mississippi Supreme Court, a copy of which shall be served upon counsel for the state and counsel for the defendant.

(2) The Mississippi Supreme Court shall consider the punishment as well as any errors enumerated by way of appeal.

(3) With regard to the sentence, the court shall determine:

(a) Whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor;

(b) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in section 99-19-101; and

(c) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

(4) Both the defendant and the state shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court.

(5) The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

(a) Affirm the sentence of death; or

(b) Set the sentence aside and remand the case for modification of the sentence to imprisonment for life.

(6) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence."

We have held in *Jackson*, and pursuant to the above section, that cases in which a death sentence is imposed will be automatically reviewed as preference cases by this Court; that the record will be reviewed and compared with similar cases to determine whether the punishment of death is too great when the aggravating and mitigating circumstances are weighed against each other in order to assure that the death penalty will not be wantonly or freakishly imposed; and only will be inflicted in a consistent and even-handed manner under like or similar circumstances.

Since *Jackson v. State*, 337 So.2d 1242 (Miss.1976), eleven (11) capital murder cases have been decided by this Court. Seven (7) of those cases have involved felony (robbery) murder. *Reddix v. State*, 381 So.2d 999 (Miss.1980); *Jones v. State*, 381 So.2d 983 (Miss.1980); *Culberson v. State*, 379 So.2d 499 (Miss.1979); *Irving v. State*, 361 So.2d 1360 (Miss.1978); *Voyles v. State*, 362 So.2d 1236 (Miss.1978); *Washington v. State*, 361 So.2d 61 (Miss.1978); *Bell v. State*, 360 So.2d 1206.

We have carefully reviewed those cases and compared them with the case and sentence *sub judice*. Appellant contends that the extent of his involvement in the crime was as an accomplice, who did not strike the fatal blow, and that Tucker was the principal, who killed the victim. He argues that Tucker was given life imprisonment by the jury, which tried him; that appellant should not receive a greater or harsher penalty than Tucker; and that appellant's death sentence should be reduced to life imprisonment.

In *Coleman v. State, supra*, Coleman was found guilty by a jury in the robbery-murder of one Burkett, and was given death. He was sixteen (16) years of age and fired the fatal shot that killed Burkett. His accomplice in the crime was permitted to enter a guilty plea to manslaughter and was sentenced to a term of years in the penitentiary. In comparing Coleman's death sentence to that of other cases heard by this Court, we said:

"Having carefully compared the case at bar with these cases in which the sentence of death was imposed, we are of the opinion that the sentence of death in this case 'is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.'

In *Irving*, *Washington* and *Bell*, the killings were totally senseless and committed upon hapless victims unarmed and unable to protect themselves. The circumstances in this case are strikingly different. Here, Harry Burkett, the victim, upon seeing the foot of Sims protruding from under the pickup truck, began firing his pistol. Only after being fired upon did the 16-year-old Coleman shoot. Again, Coleman had the opportunity to shoot Mrs. Burkett, who was an eyewitness, but did not. He fled the scene instead.

Under the specific authorization of subsection (5)(b) of § 99-19-105, this Court affirms the conviction but reverses and sets aside the death sentence and remands this case to the trial court for modification of the sentence to imprisonment for life." 378 So.2d at 650.

In *Culberson v. State, supra*, Culberson was found guilty of robbery-murder and was given the death penalty. The principal evidence and witness against Culberson was an accomplice, Alvarese Pittman. His testimony was substantially to the effect that he was with Culberson, they were going to rob the victim, that he did not know Culberson had a pistol until Culberson shot and killed the victim. On a plea of guilty, Pittman was given a comparatively light sentence in the penitentiary. The Court said, in affirming the death penalty:

"This leaves the question of whether the words in Subsection (3)(c), 'imposed in similar cases, considering both the crime and the defendant,' include for our review and comparison the exact and therefore similar crime of the accomplice and the sentence received by him for it. We construe the language to include not only the capital cases heretofore determined by this Court in which the death sentence has been imposed or rejected on the merits, but also cases involving multiple defendants when one participant is given the death penalty and an accomplice less than death. One of the questions arising in such cases is whether a sentence of less than death to an accomplice was a result of prosecutorial discretion. An affirmative answer raises a second question, was the discretion abused?

* * * * * *

We hold prosecutorial discretion was not abused because Pittman, who did not fire the fatal shot, was permitted to plead guilty to manslaughter, while Culberson, the one who fired the fatal shot, was given the death penalty. We hold the death penalty was not applied capriciously in this case. It is a proper sentence for the senseless and unprovoked murder committed by Culberson, who, after first knocking the victim down with a table leg, then shot the victim while he was lying on the ground begging, 'Help me, help me.'" 379 So.2d at 510.

In *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), Sandra Lockett was charged with aggravated murder with aggravating specifications. She and three (3) others conspired to rob a pawnbroker's shop. Lockett remained in the getaway automobile with the engine running, the other three entered the pawn shop and during the robbery, Parker, one of the three, killed the proprietor. Prior to trial, Parker pleaded guilty to the murder charge, and agreed to testify against Lockett and the other two. In return, the prosecutor dismissed the aggravated robbery charge and

the specifications to the murder charge which limited the possibility that Parker could receive the death penalty.

Two weeks before Lockett's separate trial, the prosecutor offered to permit her to plead guilty to voluntary manslaughter and aggravated robbery, offenses which carried a maximum penalty of twenty-five (25) years imprisonment. Prior to the trial, he offered to permit her to enter a plea of guilty to aggravated murder without specifications, an offense carrying a mandatory life penalty. These plea bargaining offers were rejected by Lockett; she was tried and was given the death penalty.

Although the case was reversed on another ground, the question was raised as to whether or not Lockett's conviction as an aider and abetter of the actual killer was invalid on the ground that the interpretation by the Ohio Supreme Court of the complicity provisions of the Ohio statute, under which the defendant was convicted, was so unexpected that it deprived her of her due process right to fair warning of the crime with which she was charged.

The United States Supreme Court held that her conviction as an aider and abetter of the actual killer was not invalid.

In *Coppola v. Commonwealth*, 220 Va. —, 257 S.E.2d 797 (1979), the Virginia Supreme Court held that a co-defendant is not necessarily entitled to commutation of the death sentence because an equally culpable accomplice, on substantially the same evidence, has been sentenced to life imprisonment. That Court held that a determination of the proportionability of punishment requires only that the death sentence not be so incommensurate with his conduct, measured by other jury decisions, involving similar conduct.

[33] In the case at bar, there is no record of the aggravating circumstances and mitigating circumstances in the trial of Tucker, and it is not possible to determine what circumstances influenced the jury in its life verdict. The law is well settled in this state that any person who is present, aiding and abetting another in the commission of a crime, is equally guilty with the principal offender. *Jones v. State*, 307 So.2d 549 (Miss.1975); *Bass v. State*, 231 So.2d 495 (Miss.1970); *McBroom v. State*, 217 Miss. 338, 64 So.2d 144 (1953).

[34] When we compare the present case to other capital cases, which have been affirmed by this Court on the death penalty, the present robbery-murder is equally as wanton, cruel, senseless, heinous and atrocious as those. The evidence is overwhelming that appellant was an active participant in the assault and homicide committed upon Mark Dickson and, in our opinion, is not so disproportionate, wanton or freakish when compared to those crimes so as to require this Court to reduce the sentence to life imprisonment.

Therefore, the judgment of the lower court is affirmed and Wednesday, the 10th day of September, 1980, is set as the date for execution of the sentence and infliction of the death penalty in the manner provided by law.

AFFIRMED AS TO GUILT PHASE. AFFIRMED AS TO SENTENCING PHASE.

PATTERSON, C. J., SMITH and ROBERTSON, P. JJ., and SUGG, WALKER, BROOM, BOWLING and COFER, JJ., concur.

Chester Lee COOLEY

v.

STATE of Mississippi.

No. 51807.

Supreme Court of Mississippi.

Aug. 27, 1980.

As Modified On Denial of Rehearing Dec. 17, 1980.

Defendant was convicted in the Circuit Court of Jones County, James D. Hester, J.,

APPENDIX "B"

APPENDIX "B"

Section 97-3-19. Homicide-murder defined-capital murder.

(1) The killing of a human being without the authority of law by any means or in any manner shall be murder in the following cases:

(a) When done with deliberate design to effect the death of the person killed, or of any human being;

(b) When done in the commission of an act eminently dangerous to others and evincing a depraved heart, regardless of human life, although without any premeditated design to effect the death of any particular individual;

(c) When done without any design to effect death by any person engaged in the commission of any felony other than rape, kidnapping, burglary, arson or robbery, or in any attempt to commit such felonies.

(2) The killing of a human being without the authority of law by any means or in any manner shall be capital murder in the following cases:

(a) Murder which is perpetrated by killing a peace officer or fireman while such officer or fireman is acting in his official capacity or by reason of an act performed in his official capacity, and with knowledge that the victim was a peace officer or fireman. For purposes of this paragraph, the term "peace officer" means sheriff of counties and their deputies constables, marshals and policemen of cities and towns, game wardens, parole officers, a judge, prosecuting attorney or any other court official, agents of the alcoholic beverage control division of the state tax commission, agents of the bureau of narcotics, personnel of the Mississippi Highway Patrol, and the superintendent and his deputies, guards, officers and other employees of the Mississippi State Penitentiary;

(b) Murder which is perpetrated by a person who is under sentence of life imprisonment;

(c) Murder which is perpetrated by use or detonation of a bomb or explosive device;

(d) Murder which is perpetrated by any person who has been offered or has received anything of value for committing the murder, and all parties to such a murder, are guilty as principals;

(e) When done with or without any design to effect death, by any person engaged in the commission of the crime of rape, burglary, kidnapping, arson or robbery, or in any attempt to commit such felonies;

(f) Murder which is perpetrated by the killing of any elected official of a county, municipal, state or federal government with knowledge that the victim was such public official.

APPENDIX "C"

APPENDIX "C"

Section 99-19-101. Jury to determine punishment in capital cases in separate sentencing proceeding; aggravating and mitigating circumstances to be considered.

(1) Upon conviction or adjudication of guilt of a defendant of capital murder or other capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a jury to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitutions of the United States or of the State of Mississippi. The state and the defendant and/or his counsel shall be permitted to present arguments for or against the sentence of death.

(2) After hearing all the evidence, the jury shall deliberate on the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5) of this section;

(b) Whether sufficient mitigating circumstances exist as enumerated in subsection (6) of this section, which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) For the jury to impose a sentence of death, it must unanimously find in writing the following:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5) of this section; and

(b) That there are insufficient mitigating circumstances, as enumerated in subsection (6), to outweigh the aggravating circumstances.

In each case in which the jury imposes the death sentence, the determination of the jury shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) of this section and upon the records of the trial and the sentencing proceedings. If the jury does not make the findings requiring the death sentence, the court shall impose a sentence of life imprisonment.

(4) The judgment of conviction and sentence of death shall be subject to automatic review by the supreme court of Mississippi

within sixty (60) days after certification by the sentencing court of entire record, unless the time is extended for an additional period by the supreme court for good cause shown. Such review by the supreme court shall have priority over all cases and shall be heard in accordance with rules promulgated by the supreme court.

(5) Aggravating circumstances shall be limited to the following:

(a) The capital offense was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital offense or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital offense was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, aircraft piracy or the unlawful use or detonation of a bomb or explosive device.

(e) The capital offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital offense was committed for pecuniary gain.

(g) The capital offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital offense was especially heinous, atrocious or cruel.

(6) Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital offense committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

APPENDIX "D"

APPENDIX "D"

Section 99-19-105. Review by supreme court of imposition of death penalty.

(1) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Mississippi Supreme Court. The clerk of the trial court, within ten (10) days after receiving the transcript, shall transmit the entire record and transcript to the Mississippi Supreme Court together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall setforththe title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Mississippi Supreme Court, a copy of which shall be served upon counsel for the state and counsel for the defendant.

(2) The Mississippi Supreme Court shall consider the punishment as well as any errors enumerated by way of appeal.

(3) With regard to the sentence, the court shall determine:

(a) Whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor;

(b) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in section 99-19-101; and

(c) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

(4) Both the defendant and the state shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court.

(5) The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

(a) affirm the sentence of death; or

(b) Set the sentence aside and remand the case for modification of the sentence to imprisonment for life.

(6) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal erros enumerated, the factual substantiation of the verdict, and the validity of the sentence.